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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

DOROTHY BOYD, *et al.*,

Petitioners,

v.

CAROL M. BROWNER, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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June 26, 1997

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QUESTIONS PRESENTED

The federal respondents acquired petitioners' homes, which overlay a hazardous waste site, at the direction of Congress. The federal respondents threatened petitioners, who are African-Americans, with condemnation of their homes at post-contamination value, which would have been close to zero, if petitioners did not accept the federal respondents' offers which were based on pre-contamination value. Petitioners contended that the threats were contrary to Congress' clear intent in passing the legislation and were racially discriminatory since such threats had not been made in similar acquisitions of hazardous waste sites involving white communities.

The questions presented are:

1. Whether petitioners waived their right to rescission of the agreements with the federal government to purchase their properties on the ground that the agreements were induced by threats that were illegal and racially discriminatory by refusing to return the payments paid to them.

2. Whether petitioners lost their right to rescission of the agreements with the federal government to purchase their properties on the ground that the agreements were induced by threats that were illegal and racially discriminatory because the houses on their properties were destroyed by the federal government after it acquired the properties.

PARTIES TO THE PROCEEDING

The following persons were plaintiffs in the district court: DOROTHY and WILLIE BOYD, GEORGE BRADFORD, PAUL and PATSY BREWER, CAMILLE BROWN, EVA CASTEEL BROWN, BERNICE CALLICUTT, ETHEL CHEATHAM, TALMADGE and ROSE CHEATHAM, HENRY ETTA CHILDS, JOE and JULIE COMPTON, JOYCE COOPER, BETHEL L. DAVIS, SAMMIE DAVIS, JR., BOBBIE J. ELLIS, J.E. and GLADYS FIELDS, HARREL and ANNIE FINLEY, SUZETTE FULCE, as heir to, and representative of, the Estate of LEVANNE WILLIAMS, HARLON and GURSIE GILMORE, EARIEL M. GREER, FREELON and ROSA HARMON, DOROTHY JEAN HATLEY, LAWRENCE HATLEY, LOUISE HICKS, GUSSIE and ROSCOE HILL, JR., VERSIE HOLMES, ROSIE L. HOPKINS, PRINCESS D. HUNTER, BERDIE H. IVERY, JOHN and CLIDA JAMES, BRENDA L. KING, GWENDOLYN KING, JACKIE KING, LOUISE LEWIS, REVEREND RUFUS A. MCCURRY, JOHNIE and FLORIDA MCGHEE, WILLIE and VERSIE MOORE, MOUNT ZION MISSIONARY BAPTIST CHURCH, NOLA MURPHY, WARREN and DEBRA MURPHY, WILLIAM and MAXINE NELSON, LEON and EARLENE NOIEL, NATHANIEL R. OLIVER, RAYMOND and NIKALE PARKER, RONALD O. PAXTON, MOSE RHYMES, JOHN and ANNIE RILEY, ELRIDGE ROBERTSON, MARTHA A. ROWE, BILLY and MARY F. SHEARS, BERTHA and HERBERT SINGLETARY, MARATHA HALL SMITH, PATRICIA SMITH, FRANCES STEGER, ALLISON and VERNA TATE, CALVIN and EVA VAUGHN, LUTHER L. WAITES, ROSIE and JOYCE WALLS, ESSIE and HERMAN WATSON, SR., LAURENCE E. WILLIAMS, LUERTHA WILLIAMS, ODIS and ZELLA YOUNG.

The following persons were defendants in the district court:

CAROL BROWNER, Administrator of the Environmental Protection Agency, and LIEUTENANT GENERAL ARTHUR WILLIAMS, Commander in Chief of the United States Army Corps of Engineers.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 12a-19a) is not reported. The opinion of the district court (App. 1a-9a) is also not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1996 (App. 10a-11a). A petition for rehearing and suggestion for rehearing *in banc* was filed on November 27, 1996. The petition for rehearing and suggestion for rehearing *in banc* was denied on March 28, 1997 (App. 21a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant statutes are included in the Appendix (App. 22a-23a).

STATEMENT

This case involves the federal government's purchase of plaintiffs' residential property located in the Carver Terrace subdivision in Texarkana, Texas, pursuant to a special appropriation which Congress enacted because the subdivision was a hazardous waste site that endangered the health of the residents.

The soil and groundwater of the Carver Terrace subdivision were contaminated with numerous hazardous chemicals by a creosote wood treatment facility that operated

at the site from 1920 until 1961. In 1964, half of the site was sold to a developer which built the Carver Terrace subdivision. The subdivision consisted of 79 homes and a church.

Inspections by the Texas Department of Natural Resources in 1980 and the Environmental Protection Agency in 1981 revealed the contamination existing at the site. On or about October 3, 1984, EPA placed the Carver Terrace subdivision on the Superfund cleanup list pursuant to 42 U.S.C. 9601, *et seq*.

When the Carver Terrace residents learned of the danger from the hazardous waste on the site, they sought to be relocated. However, in 1988, EPA prepared a Superfund Record of Decision ("ROD") in which it determined that the contamination at Carver Terrace would be remediated by treatment of the soil without the relocation of any of the residents.

In 1989, the Agency for Toxic Substances and Disease Registry ("ATSDR") issued a health assessment that concluded that the chemicals on the site posed a potential health threat to the residents. The assessment stated: "Long-term exposures to contaminated soils in the residential area pose a potential health risk for ingestion and dermal absorption of soil contaminants. Ground water beneath the site is contaminated and would pose a potential health risk if used for potable purposes." The assessment also stated that the remedial action previously taken by EPA to safeguard the health of residents until final cleanup was "not sufficiently protective of public health."

In 1990, Congress appropriated funds for EPA to buy out the Carver Terrace property owners. Departments of Veterans Affairs and Housing and Urban Development, and

Independent Agencies Appropriations Act of 1991, Pub. L. No. 507, Title III, 101st Cong., 2d Sess. (1990), 104 Stat. 1351, 1373 (1990); H.R. Conf. Rep. No. 900, 101st Cong., 2d Sess. 35 (1990). In 1991, Congress directed that $5,000,000 from funds previously appropriated in Public Law 101-507 be used for the purchase of the Carver Terrace subdivision and relocation of its residents. Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1992, Pub. L. No. 139, Title III, 102d Cong., 1st Sess. (1991), 105 Stat. 736, 764 (1991). The House Committee Report noted ATSDR's comments regarding the threat to public health to residents of Carver Terrace and stated (H.R. Rep. 5158, 101st Cong., 2d Sess. 48 (1990)):

> In light of the current and long-term risks enumerated in the ATSDR *Health Assessment*, the Committee directs the Environmental Protection Agency to immediately relocate permanently all residents of the Carver Terrace Superfund site and acquire the property located therein that is used for residential and other purposes.

In 1991, EPA and the U.S. Army Corps of Engineers ("the Corps") entered into an Interagency Agreement under which the Corps agreed to act as EPA's agent in relocating the Carver Terrace residents. As part of its duties as EPA's agent, the Corps undertook to appraise and purchase each plaintiff's real property and to provide moving expenses and replacement housing payments to most of the plaintiffs.

In 1992, EPA issued an Amended ROD which included a buyout and relocation assistance for the residents of Carver Terrace. The Amended ROD stated: "Actual or threatened releases of hazardous substances from this site * * * may

present an actual or potential threat to public health, welfare, or the environment."

After Congress ordered EPA to buy out and relocate the residents of Carver Terrace, defendants stated on numerous occasions that it was both their and Congress' intent that plaintiffs would receive the pre-contamination fair market value for their property. First, in Attachment 2 to the Amended ROD, "Community Relations Responsiveness Summary," the Corps stated: "The homes will receive the 'fair market value,' without regard to the homes being located on a contaminated site."

Second, in its agreement with the Corps, EPA instructed the Corps to disregard contamination in its appraisals of the Carver Terrace properties. The agreement stated: "The proximity of the property to the contaminated area shall not be a factor."

Third, on July 30, 1991, at a joint presentation by EPA and the Corps to the Carver Terrace residents relating to the relocation of the residents of the Carver Terrace subdivision, Richard Murray, Assistant Chief, Real Estate Division, Fort Worth District of the Corps, explained the buyout process. He told the residents that they would receive fair market value for their homes which would not take into account the existing contamination:

> The first real estate representative to call on you will likely be a professional appraiser. His job is to estimate the current fair market value of your property. We are required by the U.S. Constitution to pay just compensation, which the Courts have defined to mean fair market value. * * * We are

> buying property at the current fair market value. * * * The appraiser has been instructed to disregard the fact that it is on a contaminated site.

Finally, in a letter dated April 3, 1992, Rich Lemley, Director, Facilities Management and Services Division of EPA wrote to Barry J. Frankel, Director, Real Estate Directorate of the Corps:

> EPA has determined that the owners should be offered the value of their property as if clean. We also believe that it was the intent of Congress that the property owners not suffer any diminution in value due to the presence of contamination.

Subsequently, the Corps appraised all of the properties in Carver Terrace. The appraisals were based on the value of the properties without taking into consideration the contamination of the properties.

In 1992, J.T. Danuser, a Corps negotiator, hand-delivered to each plaintiff an letter, which contained the government's offer for each plaintiff's property. The Offer Letter set forth the Corps' appraised pre-contamination value of the property as the Corps' offer for the property. However, the Offer Letter threatened plaintiffs with condemnation at post-contamination value, which would have been close to zero, if they did not reach a sales agreement with defendants. Each Offer Letter stated:

> Your property is being acquired on behalf of the EPA. If we are unable to negotiate a direct purchase from you, it will be necessary to acquire the property through condemnation proceedings. This information is not to be considered a threat, but in our opinion, it is necessary that we provide it to you so that you are fully informed of the laws and

> procedures applicable to this acquisition program. * * * Should it be necessary to acquire your property through condemnation proceedings, the property will be reappraised. The Department of Justice, who will represent the United States, has directed that the reappraisal be based on the value of the property in its actual condition, which would necessitate consideration of the fact that the property is located within an environmentally unsafe area. This, in all probability, would lower the appraised value of your property.

The voluminous administrative record contains no indication that the Department of Justice ever directed that the properties be acquired at post-contamination value.

In addition to the Offer Letter's discussion of condemnation at post-contamination value, Mr. Danuser told many of the plaintiffs who rejected the Corps' initial offer that if they did not accept the Corps' offers, or offers slightly higher, the Corps would condemn their property at post-contamination value. Subsequent to these threats, virtually all of the plaintiffs accepted the Corps' initial offer or a price only slightly higher.

In the six instances where plaintiffs rejected the government's final offer, Mr. Danuser recommended in internal memoranda that the government accept the plaintiffs' final position. This recommendation was based largely on the fact that condemnation would cost the government more than the offer to plaintiffs based on pre-contamination value. Thus, contrary to his written and oral representations to plaintiffs, Mr. Danuser clearly recognized that defendants were required to pay pre-contamination value.

In a memorandum dated August 5, 1992, Robert Cribbin, Acting Chief, Civil Branch, Acquisition Division, Directorate of Real Estate of the Corps stated that he had received a call from JoAnn Levin of EPA Headquarters about the status of the Carver Terrace acquisition and that she had told him that the "'environmental equity' office at EPA headquarters was/is upset with the 'coercive' notice sent to residents of the subdivision regarding the acquisition of their property."

EPA has relocated eight other, non-minority communities which were exposed to hazardous chemicals: Love Canal, New York, Times Beach, Missouri, Minker/Stouf/Romaine, Missouri, Forest Glen, New York, Uniontown, Ohio, Montclair, New Jersey, Conroe, Texas, and Lansdowne, Pennsylvania. The Offer Letters sent to the residents in these communities did not threaten to condemn the properties based on their contaminated value if negotiations failed.

In the Times Beach, Missouri, relocation, some owners were told orally that their properties would be condemned at contaminated value if they did not accept the government's offer. However, when these threats were protested, they were withdrawn. EPA acquired three properties at Times Beach by condemnation where the property owners refused to accept the government's offer. EPA was required to pay pre-contamination fair market value for these properties.

There is substantial evidence in the record that plaintiffs did not receive fair compensation based on pre-contamination value. First, Mr. Danuser's reports to his superiors predicted that higher payments would result if defendants went to condemnation. Second, Griffin Realtors, a local realtor, concluded that many of plaintiffs' properties had a higher fair market value than the Corps' appraisals. Third, defendants' own documents consistently concluded, in determining the replacement housing payments to be made under the

Relocation Act, that the cost of houses comparable to plaintiffs' homes was substantially higher than the Corps' appraisals. Fourth, plaintiffs' comparisons of their homes with other similar properties in the area showed that the appraisals were substantially too low.

Plaintiffs filed suit in the District Court for the District of Columbia claiming, *inter alia*, first, that the sale agreements were illegal because they were entered into as the result of illegal threats of condemnation at post-contamination prices contrary to Congress' intent in instructing EPA to acquire the properties; and, second, that the threats violated the due process clause of the Fifth Amendment and the Fair Housing Act because they racially discriminated against the African-American owners in view of the lack of such threats at largely white communities similarly involving federal acquisition of properties over hazardous waste sites. The district court granted summary judgment to defendants on the ground, *inter alia*, that plaintiffs were not entitled to rescission of the sales agreements because they were not willing to pay defendants back the compensation they had received. App. 8a-9a. The Court of Appeals for the District of Columbia Circuit affirmed solely on this ground. App. 18a-19a. The court of appeals subsequently denied plaintiffs' petition for rehearing and suggestion for rehearing *in banc*. App. 21a.

REASONS FOR GRANTING THE PETITION

The court of appeals refused to consider petitioners' claims on their merits because "[e]ven assuming that the acts of the Corps rendered the contracts unlawful, rescission cannot be awarded where the plaintiff neither tenders what he

received[1] nor seeks the return of what he delivered." App. 18a. The court then distinguished two cases where the courts had ordered rescission, even though the property exchanged under the contract was not returned to the original owners. *Delta Investing Corp. v. Moore*, 366 F.2d 516, 520-521 (6th Cir. 1966); *Dermott Canal & Lumber Co. v. Walter A. Zelnicker Supply Co.*, 271 Fed. 918, 920 (8th Cir. 1921). See App. 18a-19a. The court said that "[n]either case * * * presents an instance where the plaintiff neither offers to return the property received under the contract nor seeks restoration of the property delivered by him." App. 19a. The court explained that plaintiffs "do not, and indeed cannot, seek the return of their Carver Terrace homes, which have been demolished." *Ibid.*

Thus, the court of appeals' decision not to consider the merits of plaintiffs' claims rested on a combination of two conclusions: that plaintiffs had not tendered back the payments that they had received and plaintiffs could not obtain back the entirety of the properties that they had transferred to defendants. The opinion gives no indication that defendants' destruction of plaintiffs' homes alone barred the remedy of rescission.

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[1] The district court said that, during oral argument, plaintiffs' counsel indicated that plaintiffs were not willing to repay the money that they had received. App. 8a-9a. The court of appeals relied on this same discussion. App. 19a. In actuality, however, plaintiffs' counsel told the district court that plaintiffs requested that the court order rescission without requiring plaintiffs to repay the funds to defendant until new negotiations for purchase of the properties were completed. However, counsel gave no indication that repayment would not be made if the court required it. See App. 23a-24a. The court of appeals did not address these statements of plaintiffs' counsel. In any event, whether correct or not, the factual premise of the decision below was that plaintiffs would not return the payments that they had received.

1. On April 21, 1997, this Court granted a writ of certiorari in *Oubre v. Entergy Operations, Inc.*, Supreme Court, 1996 Term, No. 96-1291, a case involving the Age Discrimination in Employment Act. The case involves the validity of a release executed by a employee at the time of leaving employment that waived her right to bring suit. The district court held, in a decision affirmed without opinion by the Court of Appeals for the Fifth Circuit, that an employee cannot challenge the validity of a release without tendering back the sums paid to the employee for the release. This Court limited the writ to a single question:

> Whether the petitioner ratified an otherwise invalid release by retaining compensation paid and/or failing to tender back sums received pursuant to the terms of her separation of employment, thus making the release binding.

The basis for the grant of the writ of certiorari in *Oubre* appears to have been a conflict of circuits. The Court of Appeals for the Fifth Circuit has held that an ADEA release cannot be set aside without the tendering of the amount paid by the defendant since "rescission must attempt to restore the *status quo ante* - that is, to return the parties to the positions they held just before they entered into the agreement." *Grillet v. Sears Roebuck & Co.*, 927 F.2d 217, 220 (5th Cir. 1991).[2] Accord, *Blakeney v. Lomas Information Systems, Inc.*, 65 F.3d 482, 485 (5th Cir. 1995)(rescission of ADEA release requires full restoration of the *status quo* by tender of entire payment); *O'Shea v. Commercial Credit Corp.*, 930 F.2d

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[2] The court of appeals in *Grillet* cited for this proposition *United States v. Texarkana Trawlers*, 846 F.2d 297 (5th Cir. 1988), *certiorari denied*, 488 U.S. 943 (1988), the same case cited by the court below in the instant case. App. 18a.

358, 362 (4th Cir. 1991)(ordinary contract principles apply to ADEA release and require tender of payment).

On the other hand, the Court of Appeals for the Eleventh Circuit has held that a tender back of the amount paid for an ADEA release is not needed in order to challenge the release. *Forbus v. Sears Roebuck & Co.*, 958 F.2d 1036, 1041 (11th Cir. 1992). The court of appeals relied on the decision of this Court in *Hogue v. Southern Ry. Co.*, 390 U.S. 516 (1968), which held that a tender of the amount paid for a release under the Federal Employees' Liability Act was not necessary to avoid a contract. The court of appeals in *Forbus* stated (958 F.2d at 1041):

> The Court in *Hogue* found that a tender requirement would deter meritorious challenges to releases in FELA lawsuits. The same deterrence factor applies to ADEA claims. Forcing older employees to tender back their severance benefits in order to attempt to regain their jobs would have a crippling effect on the ability of such employees to challenge releases obtained by misrepresentation or duress. * * *
>
> As the Supreme Court decided in *Hogue*, unless the release otherwise bars recovery, the benefits paid "shall be deducted from any award determined to be due to the injured employee." 390 U.S. at 518, 88 S.Ct. at 1152.

These considerations apply equally here.

The issue before the Court in *Oubre* is closely analogous to that in the instant case. The issue in *Oubre* is essentially whether a federal court will entertain a claim of rescission of a release, i.e., a contract to waive a civil claim, without the plaintiff tendering back the amount of money received pursuant to the release. Here, the issue is whether a federal

court will entertain a claim that property sale agreements are invalid if plaintiffs do not tender back the amounts of money received pursuant to the agreements.

Consequently, this Court's decision in *Oubre* is likely to directly affect the decision of the court of appeals in this case. Plaintiffs therefore request that either the petition for a writ of certiorari be granted or determination of the petition be delayed until *Oubre* is decided so that the writ can be granted and the case remanded to the court below in light of this Court's decision in *Oubre*.

2. Plaintiffs submit, as shown above, that the decision of the Court below depended on a combination of two conclusions: that plaintiffs had not tendered back the payments that they had received and plaintiffs could not obtain back the entirety of the properties transferred to defendants because defendants had destroyed their homes. Since the decision below was not based on alternative holdings, the reversal on the issue concerning the tender back of the payments would require reversal of the judgment below. Therefore, the first issue on which plaintiffs seek a writ of certiorari relating to the tender back of the payments is alone controlling on the outcome of the case.

However, in the event that this Court deems the inability of plaintiffs to recover back their homes as an independent ground for the court of appeals' holding that rescission does not lie, plaintiffs are also seeking a writ of certiorari on this issue. A holding that plaintiffs were not entitled to rescission of an illegal contract because defendants had destroyed their homes would have been nonsensical. There is no reason why defendants can control whether plaintiffs are entitled to rescission by destroying the property they received under the contracts. A party to a contract may of course do anything it desires with the consideration paid by the other party.

However, the party's decision to destroy the consideration it received can have no effect on the other party's legal rights.

Here, plaintiffs are willing to accept the return of their land without their homes. Plaintiffs are willing to accept the return of their land alone because Congress intended for them to be compensated for the entire value of their properties, both land and buildings, regardless of whether their homes were still standing. In these circumstances, defendants hardly have any basis, indeed, any standing, for objection.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted or this Court should delay ruling on the petition until the *Oubre* case is decided.

Respectfully submitted,

BRUCE J. TERRIS
Attorney for Petitioners

June 26, 1997

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 94-0893
(JR)

DOROTHY BOYD *et al.*

Plaintiffs,

v.

CAROL BROWNER, Administrator
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY *et al.*

Defendants.

OPINION

[stamp—Filed, AUG 09 1995, Clerk, U.S. District Court, District of Columbia]

In 1992, some eighty African-American homeowners living on a tract of chemically contaminated land in Texarkana, Texas, sold their residences to the United States Army Corps of Engineers, which was acting as agent for the Environmental Protection Agency. The homeowners also accepted government relocation assistance. The homeowners, now plaintiffs, claim in this action that the Government threatened and coerced them so that they sold their houses for too little money and accepted too little in relocation payments. They compare their treatment with that given to the inhabitants of seven white communities acquired by the EPA in similar circumstances and claim that they were discriminated against on the basis of their race.

Plaintiffs assert that defendants acted arbitrarily and capriciously and abused their discretion in violation of the Administrative Procedure Act, 5 U.S.C. § 706; that defend-

ants made inadequate relocation payments in violation of the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §§ 4621, 4623; and that defendants violated their Fifth Amendment rights and the Fair Housing Act, 42 U.S.C. § 3604 *et seq*. They seek rescission of their sales agreements and additional compensation. Before the Court is defendants' motion to dismiss or for summary judgment. Plaintiffs have filed a cross-motion for partial summary judgment. For the reasons stated below, and upon review of the entire record, defendants' motion for summary judgment will be granted.

Facts

Carver Terrace was a residential subdivision built on land that had formerly been the site of a wood treatment facility. Seventy-nine homes and a church were built there in the 1960's. Soil and groundwater contamination was discovered in 1981. In 1990, Congress appropriated $5 million to EPA for the purchase of Carver Terrace homes and the relocation of Carver Terrace residents. *See* Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1992, Pub. L. No. 102-139, Title III, 102nd Cong., 1st Sess., 105 Stat. 736, 764 (1991) (''Appropriations Act''). In 1992, Congress appropriated an additional $612,000 for this purpose. *See* Appropriations Act of 1993, Pub. L. No. 102-389, Title III, 102nd Cong., 2nd Sess., 106 Stat. 1571 (Oct. 5, 1992).[1]

The Corps of Engineers was EPA's agent for appraising and acquiring Carver Terrace properties and arranging the relocation of residents. EPA instructed the Corps to appraise the properties as if they were uncontaminated and to pay ''clean value'' or pre-contamination value for them. Carver

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[1] All but $207,059 of these appropriated funds have been spent.

Terrace residents were informed that the appraisers would disregard the fact that the homes were sited on contaminated property.

The Corps made purchase offers to Carver Terrace landowners by means of hand-delivered letters. Each letter stated that an appraisal had been made and set forth the value assigned by the Corps as a result of that appraisal. Each letter also contained the following language:

> Your property is being acquired on behalf of the EPA. If we are unable to negotiate a direct purchase from you, it will be necessary to acquire the property through condemnation proceedings. This information is not to be considered a threat, but in our opinion, it is necessary that we provide it to you so that you are fully informed of the laws and procedures applicable to this acquisition program. Please be assured that we will make every effort to negotiate a fair settlement with you. Should it be necessary to acquire your property through condemnation proceedings, the property will be reappraised. The Department of Justice, who will represent the United States, has directed that the reappraisal be based on the value of the property its actual condition, which would necessitate consideration of the fact that the property is located within an environmentally unsafe area. This, in all probability, would lower the appraised value of your property.

Plaintiffs assert that they understood this language as threatening. That assertion of their understanding — as distinct from the Corps' intent — is accepted as true for purposes of this motion, as are all of plaintiffs' allegations of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Washington Post Co. v. United States Dept. of Health and Human Services,* 865 F.2d 320, 325 (D.C. Cir. 1989). Thus, it is also accepted as true that, from 1978 to

1994, the EPA relocated at least seven non-minority communities exposed to hazardous chemicals[2] and that offer letters sent to residents of those communities were substantially similar to those used at Carver Terrace except that they did not advise homeowners that the properties would have to be condemned based on their contaminated value if negotiations failed. Three of those seven acquisitions were performed by the Federal Emergency Management Agency. The Corps of Engineers conducted and wrote the buyout letters for the other four. Oral statements about condemnation were allegedly made at Times Beach location but were withdrawn when protested.

Claim for Judicial Review

Plaintiffs' claim for judicial review under the APA is that the offer letters violated Congress' intent that the Carver Terrace owners receive "clean value" for their homes. In order to sustain that position, however, plaintiffs must first point to some "final agency action." They cannot do so here.

Agency action is "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). The Corps of Engineers' letters announced no rule of law, imposed no obligation, determined no right or liability, and fixed no legal relationship. *See Industrial Safety Equipment Assoc., Inc. v. Environmental Protection Agency,* 656 F. Supp. 852, 855, *aff'd,* 837 F.2d 1115, (D.C. Cir. 1988) (citing *American Trucking Assoc., Inc. v. United States,* 755 F.2d 1292, 1296 (7th Cir. 1985)). The letters provided information. The

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[2] Love Canal, New York; Times Beach, Missouri; Forest Glen, New York; Uniontown, Ohio; Montclair, New Jersey; United Creosoting, Texas; Lansdowne, Pennsylvania.

fact that plaintiffs understood them as threatening does not make them "threats," nor does it make them final agency action.

Even if the letters amounted to final agency action (ruling that fair market value rather than "clean value" would be paid in condemnation proceedings), plaintiffs have not shown that such a ruling would have been unlawful. The condemnation process does measure "just compensation" by fair market value. *See, United States v. Fifty Acres of Land,* 469 U.S. 24, 25-26 (1984); *United States v. Miller,* 317 U.S. 369, 373-74 (1943); *Reservation Eleven Associates v. District of Columbia,* 420 F.2d 153, 155 (D.C. Cir. 1969) (measure of compensation that must be paid in eminent domain suit is fair market value of property being condemned at time just prior to taking); *Goddard v. D.C. Redevelopment Land Agency,* 287 F.2d 343, 345 (D.C. Cir.), *cert. denied* 366 U.S. 910 (1961) (if plaintiffs do not receive just compensation in condemnation proceedings, their remedy is to appeal). Plaintiffs conceded that "the statute and legislative history [of the Appropriations Act] do not discuss whether the amount paid for the properties should be pre- or post- contamination value . . ." in the condemnation context, or for that matter, for negotiated acquisitions. (Plaintiffs' Memorandum at 14-15). Congress made no provision as to value, as it did when it decided to acquire property at Love Canal.[3] Instead, Congress simply appropriated funds for relocation:

> . . . notwithstanding any other provision of law, the Administrator of the Environmental Protection Agency shall, from funds previously appropriated under this heading in Public Law 101-507, obligate up to $5,000,000 for Koppers Texarkana Superfund site relocation.

[3] 42 U.S.C. § 9661(b): "Compensation for any property acquired pursuant to this section shall be based upon the fair market value of the property as it existed prior to the emergency declaration."

Plaintiffs have not established any basis on which the Court, could hold unlawful and set aside the Carver Terrace purchases under the Administrative Procedure Act.

Relocation Act Claim

Plaintiffs' second count complains of the violation of "Congressional objectives" set forth in the Relocation Act, 42 U.S.C. § 4621, and asserts their statutory entitlement under 42 U.S.C. § 4623 to replacement housing payments that, when added to the acquisition cost of their dwellings, would equal the cost of comparable replacement dwellings. Plaintiffs were notified of their relocation assistance determinations by letters that informed them of their rights to appeal. No plaintiff appealed the initial determination of relocation assistance benefits. There is nothing in the record indicating that appeals would have been "clearly useless". *See Communications Workers of Amer. v. AT & T,* 40 F.3d 426, 432 (D.C. Cir. 1994). Count Two must be dismissed for failure to exhaust administrative remedies.

Claim of Racial Discrimination

Plaintiffs' claim of racial discrimination is that "defendants discriminated against them on the basis of race by making threats against them which had not been made to residents of non-minority communities." (Plaintiffs' Memorandum at 36).

This equal protection claim, made under the Due Process Clause of the Fifth Amendment, stumbles at the first hurdle, which is the requirement that plaintiffs be similarly situated with those whose treatment they seek to compare with their own. *See City of Cleburne, Tex. v. Cleburne Living Center,* 473 U.S. 432, 439 (1985); *Plyler v. Doe,* 457 U.S. 202, 216 (1982). The naked assertion that Carver Terrace is an African-American community and that residents of Times

Beach, Missouri, and Forest Glen, New York, were "almost entirely white." (Plaintiffs' Exhibits 32, 34), does not begin to establish the requirement of "similar circumstances," and indeed plaintiffs appear to concede that there were "differences in offers, acquisition practices or other dissimilarities that might well exist based on a variety of factors at different sites." (Plaintiffs' Memorandum at 36). Different treatment of dissimilarly situated persons does not violate the Equal Protection Clause. *See, United States v. Bell,* 506 F.2d 207, 221 (D.C. Cir. 1974); *Klinger v. Dept. of Corrections,* 31 F.3d 727, 733 (8th Cir.), *cert. denied,* 115 S.Ct. 1177 (1995).

Even if Carver Terrace residents and residents of several different communities in different states and in different years were found to be "similarly situated," plaintiffs would have to show a discriminatory purpose or intent in order to prevail on their constitutional claim. *See Personnel Adm'r of Mass. v. Feeney,* 442 U.S. 256, 274 (1979); *Village of Arlington Hts v. Metro. Housing Dev. Corp.,* 429 U.S. 252, 265 (1977); *Washington v. Davis,* 426 U.S. 229, 239-241 (1976). The present motion does not stand or fall on this point, but it should be noted that plaintiffs have neither offered nor identified any evidence of discriminatory purpose. The event of discrimination is said to be the delivery of letters plaintiffs considered threatening, but the letters on their face were appropriate and nonthreatening[4] and do not purport to create classifications of any sort. *Cf. Hazen Paper Co. v. Biggins,* 113 S.Ct. 1701, 1705 (1993) (no disparate treatment under the ADEA when factor motivating employer is some feature other than employee's age).

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[4] In another context it has been held that a "threat" has two elements: fear on the part of the victim (a reasonable belief that the defendant has the necessary power to cause economic harm), and intent on the part of the defendant to exploit that fear. *United States v. Capo,* 817 F.2d 947, 951 (2d Cir. 1987) (applying the Hobbs Act, 18 U.S.C. § 1951). No

Plaintiffs' most pointed claim of racial discrimination invokes section 804(a) of the Fair Housing Act, 42 U.S.C. § 3604(a). In making that claim, however, plaintiffs are in approximately the same legal position as the plaintiff in *Dorsey v. United States Dept. of Labor,* 41 F.3d 1551 (D.C.Cir. 1994): it was unclear in that case whether the statute under which plaintiff sued provided a private right of action for compensatory damages, but it was held unnecessary to resolve the question because, in any case, the statute did not unambiguously waive the government's sovereign immunity as to monetary claims. Here, plaintiffs submit letters from cabinet officers conceding the government's liability for violations of the Fair Housing Act, (Plaintiffs' Exhibits 36, 37), in an effort to contest or distinguish the First Circuit's decision in *NAACP v. Secretary of Housing and Urban Development,* 817 F.2d 149, 153-154 (1st Cir. 1987), that the federal government cannot be sued directly under that Act. But there is no need to decide that question, because sovereign immunity bars the relief plaintiffs seek. Plaintiffs do what they can to sidestep this problem, claiming their right to "remediation" of the alleged statutory violations and seeking the remedy of "rescission," but counsel made it clear at oral argument that plaintiffs are not

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such wrongful intent is shown or even alleged here. A showing that the Corps of Engineers intended to push Carver Terrace residents into selling at the offer prices would not establish the wrongful government conduct necessary to void an agreement on the ground of economic duress. *See, United States v. Vanhorn,* 20 F.2d 812, 816 (9th Cir. 1981) (duress not a question of fact under state law where defendant came to plaintiff's home and refused to leave without some kind of a new agreement; essence of duress is surrender to unlawful or unconscionable demands). There was no Congressional mandate that Carver Terrace residents be paid "clean" value for their homes. The Corps of Engineers may have been on shaky ground had they *failed* to accompany their offers with the information that sellers could expect only fair market value in the event of condemnation.

prepared to tender back the money they received when they sold their Carver Terrace properties without assurance that they would receive greater sums of money immediately. In other words, the only recovery they seek is money. Because the Fair Housing Act does not "unambiguously waive" the government's sovereign immunity defense, plaintiffs may not have a monetary recovery. *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992) (reaffirming long line of cases holding that waivers of the government's sovereign immunity must be "unequivocally expressed" to be effective where a claimant demands monetary relief).

Defendants' motion for summary judgment will be granted. An appropriate order will issue with this opinion.

James Robertson
United States District Judge

Date: August 9, 1995

APPENDIX B

[stamp—Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5361
(JR)

Dorothy Boyd, *et al.*,
Appellants

v.

Carol M. Browner,
Administrator U.S. Environmental Protection Agency
and
Arthur Williams,
Lieutenant General, U.S. Army Corps of Engineers,
Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 94cv00893)

[stamp—United States Court of Appeals
For the District of Columbia Circuit, Filed OCT 29 1996]

Before: WILLIAMS, GINSBURG and RANDOLPH,
Circuit Judges.

JUDGMENT

[stamp—MANDATE, Pursuant to the provisions of Fed. R. App. Pro. 41(a), 4/11/97, BY /s/ E. Brown, Deputy Clerk]

This appeal was considered on the record from the United States District Court for the District of Columbia and on the

briefs filed by the parties. The Court has determined that the issues presented occasion no need for a published opinion. *See* D.C. Cir. Rule 36(c). For the reasons stated in the accompanying Memorandum, it is

ORDERED AND ADJUDGED by the Court that the order of the District Court is affirmed.

The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a).

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Eva Brown
Deputy Clerk

Boyd v. Browner, No. 95-5361

Plaintiffs owned single-family houses developed by Carver Terrace, Inc., in Texarkana, Texas, on a tract of land that had been used for wood treatment purposes. In 1980 the Texas Department of Water Resources found that the tract had been contaminated with chemicals commonly used to preserve wood. The EPA placed the Carver Terrace site on the National Priorities List in 1984 pursuant to its authority under the Comprehensive Environmental Response, Compensation and Liability Act of 1980. 42 U.S.C. § 9620(d)(2). Initially, the EPA decided to treat the soil and the ground water for contaminants but to allow the residents to continue living on the site. On review of the proposed EPA remedy, however, Congress appropriated $5,000,000 to relocate the residents of Carver Terrace, Pub. L. No. 102-139, Title III, 105 Stat. 736, 764 (1991), and in the accompanying legislative history expressed an intention that the EPA should "relocate permanently all residents of the Carver Terrace Superfund site and acquire the property located therein . . . ." H.R. Rep. No. 101-556, 101st Cong., 2d Sess. 49 (1990); S. Rep. No. 101-474, 101st Cong., 2d Sess. 106 (1990) ("The Committee concurs with the House in earmarking $5,000,000 for relocation assistance for residents and for the purchase of homes at the Koppers Texarkana Superfund site.").

The U.S. Army Corps of Engineers (the "Corps"), acting as agent for the EPA, negotiated the purchase of the Carver Terrace homes from the plaintiffs based upon appraisals aimed at calculating the pre-contamination value of the properties. In the course of the negotiations, the Corps sent a letter to all but one of the plaintiffs that included the following statement:

> Your property is being acquired on behalf of the EPA. If we are unable to negotiate a direct purchase from

> you, it will be necessary to acquire the property through condemnation proceedings. This information is not to be considered a threat, but in our opinion, it is necessary that we provide it to you so that you are fully informed of the laws and procedures applicable to this acquisition program. Please be assured that we will make every effort to negotiate a fair settlement with you. Should it be necessary to acquire your property through condemnation proceedings, the property will be reappraised. The Department of Justice, who will represent the United States, has directed that the reappraisal be based on the value of the property in its actual condition, which would necessitate consideration of the fact that the property is located within an environmentally unsafe area. This, in all probability, would lower the appraised value of your property.

Joint Appendix ("J.A.") at 230-31. It appears that the Department of Justice did not issue any direction adopting the contaminated-value approach to the valuation of the plaintiffs' properties in condemnation.

By the end of 1992, all of the plaintiffs had executed contracts of sale conveying their property to the Corps. Many of the plaintiffs also applied for, and received, relocation benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 ("Relocation Act"), 42 U.S.C. § 4601 et seq., benefits which went to the additional cost of obtaining replacement housing and moving expenses.

The plaintiffs filed suit in federal district court for the District of Columbia challenging the contracts conveying their property to the Corps. They claimed that the threat to condemn their properties at post-contamination value, made both in the letter quoted above and in oral statements to some of the plaintiffs, was contrary to the intent of Con-

gress, in violation of the Administrative Procedure Act, 5 U.S.C. § 701 et seq. ("APA"), and therefore that the contracts themselves violated the APA. Similarly, the plaintiffs contended that the threat to condemn at post-contamination value was racially discriminatory and therefore that the sales agreements themselves violated the guarantee of due process (and equal protection) in the Fifth Amendment and the prohibition against racial discrimination contained in § 804 of the Fair Housing Act, 42 U.S.C. § 3604(a).[1] Plaintiffs also challenged the benefits paid to them under the Relocation Act, claiming that under it they were entitled to higher payments for replacement housing. The district court granted summary judgment in favor of the government and the plaintiffs appealed.

At oral argument (and in an order to the parties before argument) we raised the question of whether this court had jurisdiction over the appeal, in light of 28 U.S.C. § 1295 (a)(2), which, with certain irrelevant exceptions, provides that the Federal Circuit has exclusive jurisdiction over appeals from the district courts where the jurisdiction of the district court was "based in whole or in part" on the Little Tucker Act, 28 U.S.C. § 1346. The Tucker Act itself, 28 U.S.C. § 1491, creates jurisdiction in the Court of Federal Claims "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." For claims under $10,000, the

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[1] "[I]t shall be unlawful—(a) to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status or national origin."

Little Tucker Act creates concurrent jurisdiction in the district courts. 28 U.S.C. § 1346(a)(2). A claim that the plaintiffs were entitled to monetary relief because the Corps obtained the sales agreements by means of threats that violated the APA, the Fair Housing Act, or the Fifth Amendment would likely fall, in whole or in part, within the purview of the Tucker Act (and, for amounts under $10,000, the Little Tucker Act).

In their Third Amended Complaint plaintiffs requested both rescission of the sales contracts and "appropriate compensatory and punitive damages." J.A. 276. Plaintiffs now argue, however, that (as regards claims relating to the contracts, as opposed to ones under the Relocation Act) they expressly dropped any claim for damages and limited themselves to a request for rescission, pointing to a colloquy with the district court recorded at J.A. 316-18. Plaintiffs' brief on appeal also affirms that the only remedy that they pursued in the district court was rescission. Appellants' Brief at 44. Although some of these assertions were ambiguous, counsel for plaintiffs at oral argument very precisely stated that the plaintiffs sought only rescission, explaining that, in the event that after a judgment of rescission the government and plaintiffs failed to agree on new, higher prices for the land, plaintiffs' only remedy would be a *separate* action for damages (presumably under the Tucker Act or Little Tucker Act). We therefore find that plaintiffs' contract claim was exclusively for rescission of the sales contracts, not for monetary relief, so that the contract claim does not trigger application of 28 U.S.C. § 1295(a)(2).

Nor does the claim under the Relocation Act place the appeal under § 1295(a)(2), because that claim as presented on this appeal is frivolous. Section 203(a)(1) of the Relocation Act provides, in relevant part:

> In addition to payments otherwise authorized by this subchapter, the head of the displacing agency shall

> make an additional payment not in excess of $22,500 to any displaced person who is displaced from a dwelling actually owned and occupied by such displaced person for not less than one hundred and eighty days prior to the initiation of negotiations for the acquisition of the property.

42 U.S.C. § 4623(a)(1). The regulations promulgated by the Secretary of Transportation pursuant to the Relocation Act, see 42 U.S.C. § 4633(b), provide for an administrative appeal of an adverse agency decision concerning relocation payments, including payments for replacement housing. 49 CFR § 24.10.

Exhaustion of administrative remedies is normally a prerequisite for judicial review. The plaintiffs did not file administrative appeals with the Corps, however, even though they were informed of the availability of administrative appeals and of the procedure that they were required to follow.

Plaintiffs argue in their reply brief that there was no requirement in the Relocation Act or in the regulations promulgated pursuant to the Relocation Act that they exhaust the administrative remedies available to them. Thus, following *Darby v. Cisneros,* 509 U.S. 137 (1993), they say that the exhaustion requirement should not apply. Plaintiffs failed, however, to make this argument in their initial brief on appeal, and they therefore have waived the argument. See *Pennsylvania Electric Co. v. Federal Energy Regulatory Commission,* 11 F.3d 207, 209 (D.C. Cir. 1993).

Plaintiffs also invoke the futility exception from the exhaustion requirement, which is applicable in circumstances "'where 'following the administrative remedy would be futile *because of certainty of an adverse decision.*'" *Randolph-Sheppard Vendors of America v. Weinberger,* 795

F.2d 90, 105 (D.C. Cir. 1986) (quoting 3 K. Davis, Administrative Law Treatise § 20.07 (1958)) (emphasis added in the original). In support of the claim, they cite evidence showing that they were afraid of the health consequences of remaining in their homes, that some of them were told by representatives of the Corps that if they did not accept the replacement housing payments offered, they would not receive any payment at all, that "in light of their previous experience negotiating with the government for the sale of their homes, plaintiffs did not see any hope in further negotiations," and that some of the plaintiffs were unaware of their rights even though they had received letters informing them of the available administrative remedies. Appellants' Brief at 49.

None of these circumstances rises to the level of futility as it has been applied in this circuit. See *Communications Workers of America v. American Telephone & Telegraph Co.*, 40 F.3d 426, 432 (D.C. Cir. 1994) ("The futility exception is, however, quite restricted, and has been applied only when resort to administrative remedies is clearly useless.") (citations and internal quotations omitted). Oral statements to some of the plaintiffs by one of the Corps' negotiators and discouragement because of previous dealings with the Corps cannot support a conclusion of certainty of an adverse decision. Thus plaintiffs' action under the Relocation Act must be dismissed for failure to exhaust administrative remedies.

The possibility of recovery on the Relocation Act claim before the district court might seem, if it were deemed a Little Tucker Act claim,[2] to require application of 28

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[2] It may be argued that there is jurisdiction independent of the Little Tucker Act under the analysis of *Bowen v. Massachusetts*, 487 U.S. 879 (1988), but we need not reach that issue in light of the analysis set forth in the text.

U.S.C. § 1295(a)(2), which covers appeals where the *district court*'s jurisdiction was based in whole or in part on the Little Tucker Act. But such a literal construction of § 1295 (a)(2) would mean—by virtue of the section's "in whole or in part" language—that a Little Tucker Act claim, no matter how plainly dead, would shunt over to the Federal Circuit cases where the only live issues were ones for which that circuit's expertise was irrelevant.

Having found jurisdiction, we proceed to plaintiffs' rescission claim. Even assuming that the acts of the Corps rendered the contracts unlawful, rescission cannot be awarded where the plaintiff neither tenders what he received nor seeks the return of what he delivered. "A rescission is an avoidance of a transaction. Rescission will normally be accompanied by restitution on both sides." Dan B. Dobbs, 1 Law of Remedies § 4.3(6) (2d ed. 1993); see also *United States v. Texarkana Trawlers,* 846 F.2d 297, 304 (5th Cir. 1988). The plaintiffs cite two cases in support of the proposition that the courts may order rescission even though the property exchanged under the contract is not returned to the original owners.[3] *Delta Investing Corp. v. Moore,* 366 F.2d 516, 520-21 (6th Cir. 1966) (where defendant had fraudulently sold plaintiff a leasehold of negative value, which had terminated without fault on plaintiff's part, plaintiff could rescind transaction without offering the leasehold in exchange for the return of the consideration he had furnished); *Dermott Land & Lumber Co. v. Walter A. Zelnicker Supply Co.,* 271 F. 918, 920 (8th Cir. 1921) (in rescinding contract

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[3] The third case cited by the plaintiffs, *First National Bank & Trust Co. v. American Security & Trust Co.,* 437 F. Supp. 771 (D.D.C. 1977), is inapplicable since it concerns the issue of whether a party, as a necessary prerequisite for an action for rescission based on fraud, must offer to restore benefits received under the contract. It does not address the question of whether a court can ultimately award rescission without restoration of the property exchanged under the contract.

that had been partially executed, plaintiff was not required to give defendant credit for goods delivered by defendant to plaintiff at the higher value that plaintiff realized in resale of those goods). Neither case, however, presents an instance where the plaintiff neither offers to return the property received under the contract nor seeks restoration of the property delivered by him.

That is precisely the position of the plaintiffs in this case. They do not offer to tender back the money they received without an assurance that they will receive greater compensation immediately, District Court Opinion at 11, *and* they do not, and indeed cannot, seek the return of their Carver Terrace homes, which have been demolished. Regardless of whether the acts of the Corps were unlawful, the district court could not have awarded the remedy that plaintiffs purport to seek.

While in their Third Amended Complaint plaintiffs asserted claims to judgments declaring that defendants had violated the 5th Amendment, the Fair Housing Act and the APA, their brief before us appears to jettison that claim along with the claim for damages. Appellants' Brief at 3-4, 44. In any event, we know of no authority that enables a plaintiff to seek a "declaratory judgment" on a *fully matured* legal claim, thereby in effect seeking a ruling of liability alone, with *no* legal effect other than to resolve a key issue that is a predicate to success in a later lawsuit seeking damages. Cf. 10A Charles A. Wright et al., Federal Practice and Procedure al. § 2759, at 648 (2d ed. 1983) (pointing out that one of the factors militating strongly against exercise of discretion to entertain a declaratory judgment action is the likelihood that it will not settle the dispute between the parties but will merely engender piecemeal litigation).

As plaintiffs' lawsuit seeks only remedies that are unavailable, the judgment of the district court must be

Affirmed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1996
94cv00893

No. 95-5361

Dorothy Boyd, et al.,

Appellants

v.

Carol M. Browner, in her official capacity as Administrator of the U.S. Environmental Protection Agency and Arthur Williams, Lieutenant General,

Appellees

BEFORE: Williams, Ginsburg and Randolph, Circuit Judges

ORDER

[stamp—United States Court of Appeals
for the District of Columbia Circuit, Filed MAR 28 1997]

Upon consideration of appellants' petition for rehearing filed November 27, 1996, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1996
94cv00893

No. 95-5361

Dorothy Boyd, et al.,

Appellants

v.

Carol M. Browner, in her official capacity as Administrator of the U.S. Environmental Protection Agency and Arthur Williams, Lieutenant General,

Appellees

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

[stamp—United States Court of Appeals
for the District of Columbia Circuit, Filed MAR 28 1997]

Upon consideration of appellants' Suggestion for Rehearing *In Banc,* and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

STATUTE INVOLVED

Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1992, Public Law 139, Title III, 102d Cong. 1st Sess. (1991), 105 Stat. 736, 764 (1991), provides:

> [N]otwithstanding any other provision of law, the Administrator of the Environmental Protection Agency, shall, from funds previously appropriated under this heading in Public Law 101-507, obligate up to $5,000,000 for Koppers Texarkana Superfund site relocation.

PARTIAL TRANSCRIPT OF ARGUMENT IN DISTRICT COURT

[MR. TERRIS:] Now [defendant's] counsel says to Your Honor, what do the plaintiffs want? We want recision [sic] because we want these negotiations to be done a legal way. Not threatened by an illegal threat -- not with an illegal threat, not threatened with a racially discriminatory threat, but done in a way which is legal.

Then if the negotiations do not work out, plaintiffs can go to condemnation court. I suspect most of the negotiations will work out once that threat has been removed.

But our position on what we want is very simple and we stated it, I think, very clearly.

THE COURT: Do you mean real technical recision [sic], Mr. Terris, in which the plaintiffs tender back the money?

MR. TERRIS: Well, I think they should be protected, Your Honor, from having to hand it back until the negotiations have gone through, Your Honor.

I think given the equitable circumstances of this situation where the government, in my view, has really been extremely underhanded in what it did, having its own documents inside these agencies diametrically inconsistent with what they were telling the plaintiffs. I think they should be protected from having to give back the money until the negotiations and/or condemnation have been completed.

* * *

THE COURT: Now, are you representing to the Court that all 60 of those people [the plaintiffs] want recision? [sic]

MR. TERRIS: Yes, I am.

THE COURT: But they want recision [sic], I assume, a safety net? In other words, they want recision that gives them --

MR. TERRIS: Yes.

THE COURT: -- only more rather than less they got from the actual --

MR. TERRIS: No.

THE COURT: -- actual transactions?

MR. TERRIS: I'm perfectly willing to take -- we're willing to take our chances that they will not get less.

But what we don't want, and we had this discussion earlier, to have to pay the money back in advance. I don't think there's any question they'll get at least what they got before and -- because the government's policy is to pay more than what they got before.

(2)

Supreme Court, U.S.
FILED
SEP 26 1997
CLERK

No. 96-2041

In the Supreme Court of the United States

OCTOBER TERM, 1996

DOROTHY BOYD, ET AL., PETITIONERS

v.

CAROL M. BROWNER, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
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14 pp

QUESTION PRESENTED

Whether the court of appeals erred in rejecting petitioners' claim for rescission of their contracts for sale of real property to the government because of petitioners' unwillingness to tender back the payments they received under the contract.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-2041

DOROTHY BOYD, ET AL., PETITIONERS

v.

CAROL M. BROWNER, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10a-19a) is not published, but the judgment is noted at 107 F.3d 922 (Table). The opinion of the district court (Pet. App. 1a-9a) is reported at 897 F. Supp. 590.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1996. A petition for rehearing was denied on March 28, 1997. Pet. App. 20a-21a. The petition for a writ of certiorari was filed on June 25, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioners are African-Americans who owned single-family houses located on a tract of chemically contaminated land in Texarkana, Texas. Pet. App. 1a, 12a. In 1991, Congress, pursuant to its authority under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, appropriated $5 million to the Environmental Protection Agency (EPA) for acquisition of the contaminated property and permanent relocation of the site's residents. Pet. App. 2a, 12a; Pet. 2-3. In 1992, Congress appropriated an additional $612,000 for that purpose. Pet. App. 2a.

The EPA, through its agent, the U.S. Army Corps of Engineers (Corps), negotiated the purchase of petitioners' property based upon appraisals at its pre-contamination value, *i.e.* the value of the property as if it were not contaminated. Pet. App. 2a-3a, 12a-13a. When making purchase offers, the Corps sent individual letters to the petitioners stating that, if negotiations of a direct purchase failed, the property would have to be acquired through condemnation proceedings after a reappraisal based on the actual value which would likely be lower then the appraised value. *Id.* at 12a-13a. The letter specified that that information should not be considered a threat because it was necessary so that petitioners would be fully informed of the relevant law and procedures, and because the Corps would make every effort to negotiate a fair settlement with them. *Ibid.* By the end of 1992, petitioners all executed contracts selling their property to the Corps. Many of them also received relocation benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970

(Relocation Act), 42 U.S.C. 4601 *et seq.*, to assist with moving expenses and the cost of replacement housing. Pet. App. 13a. All but $207,059 of the appropriated funds have been spent. *Id.* at 2a n.1.

b. After accepting the government's purchase payments and relocation benefits, petitioners filed suit, in the United States District Court for the District of Columbia, against respondents, the administrator of the EPA and an Army Corps of Engineers official, challenging the validity of the contracts conveying their property to the Corps. Petitioners alleged, *inter alia*, that the contracts violated the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, because respondents acted arbitrarily and capriciously and abused their discretion by threatening to condemn their properties at post-contamination values, contrary to congressional intent. Pet. App. 13a-14a. Petitioners also claimed that they were entitled to higher payments for replacement housing under the Relocation Act. *Ibid.* They also alleged that the contracts violated the Fifth Amendment's guarantee of due process and equal protection, as well as Section 804(a) of the Fair Housing Act, 42 U.S.C. 3604(a), because the threatened post-contamination value condemnation was racially discriminatory in that residents of seven white communities, whose contaminated properties had been acquired by the EPA, were treated differently. Pet. App. 1a, 14a. Petitioners sought rescission of the sales contracts and additional compensation. *Id.* at 2a.

2. The district court granted respondents' motion for summary judgment. Pet. App. 1a-9a. For purposes of the summary judgment motion, the court accepted as true petitioners' factual allegations, including their contention that they understood the

language in the Corps' letter to be threatening and their assertion that, from 1978 to 1994, "the EPA relocated at least seven non-minority communities exposed to hazardous chemicals and that offer letters sent to residents of those communities were substantially similar" to those sent petitioners, "except that they did not advise homeowners that the properties would have to be condemned based on their contaminated value if negotiations failed." *Id.* at 3a-4a.

The court held that petitioners' challenges to the contracts under the APA were not subject to judicial review because the government letters containing the alleged threats did not amount to final agency action. Pet. App. 4a-5a. It further ruled that, even if the letters constituted final agency action, petitioners had not shown that such a ruling would have been unlawful because "[t]he condemnation process does measure 'just compensation' by fair market value." *Id.* at 5a (citations omitted). And, petitioners conceded that the statutory provision directing the EPA's acquisition of the land did not specify whether the purchase should be at pre- or post-contamination value. *Ibid.* The court ruled that petitioners' claim under the Relocation Act must fail because they had not exhausted administrative remedies. *Id.* at 6a.

The district court also held that petitioners could not establish a valid claim of racial discrimination because they had not shown that they were similarly situated to the residents in the non-minority communities involved with federal acquisition of properties over hazardous waste sites, who allegedly had been treated differently. Pet. App. 6a. Petitioners had conceded that there were "differences in offers, acquisition practices or other dissimilarities that might well exist based on a variety of factors at different sites."

Id. at 7a. The court further ruled that, even if the residents of the non-minority communities were found to be "similarly situated," petitioners could not prevail absent a showing of a discriminatory purpose or intent, and petitioners had not offered or identified evidence of any such purpose or intent. The only evidence proffered was the Corps' letter which, in the court's view, was "appropriate and nonthreatening." The court noted that, in fact, the Corps "may have been on shaky ground had they *failed* to accompany their offers with the information that sellers could expect only fair market value in the event of condemnation." *Id.* at 7a-8a n.4.

Finally, the court ruled that petitioners' Fair Housing Act claim was barred because the federal government had not waived its sovereign immunity against monetary relief under that Act. Pet. App. 8a-9a. The court rejected petitioners' attempt to characterize the relief sought as "remediation" or "rescission," because petitioners had made it clear that they were "not prepared to tender back the money they received when they sold their * * * properties without assurance that they would receive greater sums of money immediately." *Ibid.*

3. The court of appeals affirmed. Pet. App. 10a-19a.[1] The court ruled that, even if petitioners are

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[1] As a threshold matter, the court of appeals determined that it had jurisdiction over the appeal, notwithstanding 28 U.S.C. 1295(a)(2), which generally vests the Federal Circuit with jurisdiction over appeals from district courts where the jurisdiction of the district court was based in part on the Little Tucker Act, 28 U.S.C. 1346. Pet. App. 14a-16a. The court acknowledged that a claim for monetary relief because the Corps violated the APA, the Fair Housing Act, or the Fifth Amendment, would likely be based in part on the Little Tucker

correct in claiming that the Corps' acts rendered the sales contracts unlawful, the rescission sought by petitioners was not available to them. The court reasoned that, because "rescission cannot be awarded where the plaintiff neither tenders what he received nor seeks the return of what he delivered," rescission was not available to petitioners who were not willing to tender back the money they had received from the government "without an assurance that they [would] receive greater compensation immediately," and who could not seek the return of their houses which had been demolished. Pet. App. 18a-19a. In light of its conclusion that the remedies sought by petitioners' lawsuit were unavailable, the court of appeals did not reach the merits of petitioners' claims.

ARGUMENT

1. a. Petitioners contend (Pet. 10-12) that the instant case is closely analogous to the issue before the Court in *Oubre* v. *Entergy Operations, Inc.*, No. 96-1291 (to be argued November 12, 1997), and that the Court, therefore, should either grant review now or delay ruling on the petition so that review can be

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Act (or the Tucker Act for amounts of $10,000 or more), but concluded that petitioners had abandoned any claim for damages under the contracts and had limited themselves to a request for rescission. *Id.* at 15a (citing district court argument and petitioners' court of appeals brief). The court found that the Relocation Act claim did not alter the jurisdictional ruling because that claim was frivolous, in light of petitioners' failure to comply with the regulatory requirement of an administrative appeal. *Id.* at 15a-18a. The court also found that petitioners appeared to jettison their claim for declaratory relief—relief that would not be available, in any event, because it would only serve as a predicate to success in a later suit for damages. *Id.* at 19a.

granted and the case remanded following issuance of the Court's decision in *Oubre*.

The question before the Court in *Oubre* involves the validity of an employee's waiver of rights under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, and whether retention of severance payments ratified the waiver, where the waiver did not satisfy specifically enumerated statutory prerequisites to a knowing and voluntary waiver of ADEA rights. The ADEA contains detailed provisions governing the validity of any purported waiver of the right to bring suit under that statute. 29 U.S.C. 626(f). The *Oubre* case turns on matters of statutory construction related to those provisions, as well as the objectives underlying congressional enactment of the ADEA, including deterrence of employers from engaging in unlawful practices. No analogous statutory text or congressional purpose is at issue here. The steps necessary to avoid or rescind the sales contracts in the instant case are governed by principles of equity and common law, not the statutory requirements and remedial purposes of the ADEA. Cf. *Oberg* v. *Allied Van Lines, Inc.*, 11 F.3d 679, 683 n.5 (7th Cir. 1993), cert. denied, 511 U.S. 1108 (1994).

For similar reasons, the Court's decision in *Hogue* v. *Southern Ry.*, 390 U.S. 516 (1968), see Pet. 11, does not support petitioners' argument for review. The *Hogue* case involved the validity of a waiver of claims under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.* The Court's ruling that the employee could proceed with his suit under the FELA, without tendering back the consideration he had received from his employer, was based on the Court's conclusion that requiring tender back would be

"wholly incongruous with the general policy of the Act" to provide injured employees a right to recover for injuries negligently inflicted by their employer. 390 U.S. at 518. In contrast to the situations in *Hogue* and *Oubre*, conditioning rescission of petitioners' contracts on restoration of the benefits they have received would not arguably run afoul of a remedial statutory scheme. Rather, it would accord with the equitable principle that a party cannot seek to unmake a contract while simultaneously retaining the contract's benefits.

Therefore, the Court's decision in *Oubre* is unlikely to have any bearing on the issues presented here, and there is thus no reason to defer consideration of the petition or to grant the petition pending the outcome of that case.

b. The decision below is consistent with the decisions of other courts of appeals holding that the equitable remedy of rescission cannot be afforded to parties who are unable or unwilling to surrender the benefits of the challenged contract and restore the status quo ante. In *United States* v. *Texarkana Trawlers*, 846 F.2d 297, cert. denied, 488 U.S. 943 (1988), the Fifth Circuit explained why these principles preclude a party seeking rescission from retaining money received under the challenged contract:

> Rescission, unlike termination, requires the parties to "unmake" the contract. Rescission * * * attempts to restore the parties to the rescinded contract to the *status quo* that existed before the contract was formed. The parties can restore each other to the *status quo ante* only if they can restore to each other what each took under the rescinded contract. If it is impossible to insure

> that all property exchanged is returned, then the contract cannot be rescinded. Even the party seeking rescission must return whatever property it has received under the rescinded contract.

Id. at 304 (citations omitted).

Other courts of appeals have similarly held that rescission requires a return to the pre-contract status quo, and that rescission cannot be effected if return to the status quo is not feasible. See, *e.g.*, *Hibiscus Associates, Ltd.* v. *Board of Trustees of the Policemen and Firemen Retirement System*, 50 F.3d 908, 917 (11th Cir. 1995); *Erie Telecommunications, Inc.* v. *City of Erie*, 853 F.2d 1084, 1092 (3d Cir. 1988); *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 280 F.2d 915, 928 (1st Cir.), cert. denied, 364 U.S. 911 (1960).

2. Petitioners assert (Pet. 12-13) that review also may be warranted because, in determining that rescission is unavailable, the court of appeals relied in part on the fact that petitioners could not seek return of their houses because they had already been destroyed by respondents. Petitioners contend that respondents' actions should have no effect on petitioners' legal rights to rescission.

As petitioners appear to acknowledge (Pet. 12), the inability of petitioners to recover their homes does not appear to have been an independent ground for the court of appeals' ruling. Regardless of whether the government was willing or able to return petitioners' property, petitioners' refusal to tender back the payments they received under the contracts precludes rescission of the contracts. In any event, respondents destroyed petitioners' homes, not to frustrate subsequent claims of rescission, but because the govern-

ment had sought the property for that specific purpose, as part of its plan to remedy the environmental hazards on petitioners' land. Because respondents did not engage in any wrongful conduct, but only carried out the actions contemplated by the sales contracts, their conduct cannot support an equitable exception that would permit rescission without return to the pre-contract status quo. Cf. *Financial Timing Publications, Inc.* v. *Compugraphic Corp.*, 893 F.2d 936, 946-947 (8th Cir. 1990).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 96-2041

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

DOROTHY BOYD, ET AL.,

Petitioners,

v.

CAROL M. BROWNER, ET AL.,

Respondents.

On Petition For a Writ of Certiorari to The United States Court of Appeals For The District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

1. Plaintiffs' petition for a writ of certiorari requested, in the alternative, that either the writ be granted or that resolution of the petition be stayed until this Court decides *Oubre v. Entergy Operations, Inc.*, 1996 Term, No. 96-1291, which is being argued on November 12, 1997. Plaintiffs contended that the issue in *Oubre* is closely related to that in the present case.

Oubre involves the issue whether an employee can sue for wrongful termination under the Age Discrimination in Employment Act of 1967 ("ADEA") without tendering severance payments back to the employer. Defendants here contend that "the ADEA contains detailed provisions governing the validity of any purported waiver of the right to bring suit" and that *Oubre* "turns on matters of statutory construction related to those provisions * * *." Brief for the Respondents in Opposition ("Def. Opp."), p. 7. Defendants state that "[n]o analogous statutory text or congressional purpose is at issue here" and that the present case is "governed by principles of equity and common law." *Ibid.*

In fact, application of the tender-back doctrine in *Oubre* also turns on principles of equity and common law. The district court in *Oubre* held that, although the Older Workers Benefit Protection Act ("OWBPA"), codified at Section 7 of the ADEA, provides employees with certain protections that were not given to Oubre, Oubre's waiver was not void but merely voidable at Oubre's option. Because Oubre had not tendered back the severance paid to her as consideration for the waiver, the district court found that she had ratified the invalid waiver. The district court's decision to apply the common-law tender-back doctrine, which the appellate court affirmed without opinion, is therefore an application of equitable principles and common law, and does not turn on the language of the ADEA or congressional intent. Instead, the issue is whether application of the tender-back doctrine, as a condition

precedent to suit, nullifies the protective measures codified by Congress in the OWBPA.

Other employment discrimination cases underscore this point. This Court has held that a tender back of the amount paid for a release under the Federal Employees' Liability Act was not necessary to avoid a contract. *Hogue v. Southern Ry.*, 390 U.S. 516 (1968). Relying on *Hogue*, the Court of Appeals for the Eleventh Circuit has held that an employee need not tender back the amount paid for an ADEA release in order to challenge the release. *Forbus v. Sears Roebuck & Co.*, 958 F.2d 1036, 1041 (11th Cir. 1992). These cases were likewise decided on the basis of common-law principles, rather than particular statutory provisions.

Defendants further argue that *Oubre* turns on "the objectives underlying congressional enactment of the ADEA, including deterrence of employers from engaging in unlawful practices." Def. Opp. 7. However, the underlying statute in the present case is closely analogous. Section 804 of the Fair Housing Act, 42 U.S.C. 3604(a), is designed to provide a remedy for persons who have been subjected to unlawful discriminatory actions by the government and thereby to deter government officials from engaging in such activities in the future. Here, even more than in cases under the employment discrimination laws, a requirement that plaintiffs return the money they were paid before they can litigate would seriously undermine their ability to bring suit and thereby to deter defendants' allegedly illegal conduct. Indeed, here, since plaintiffs needed the money they received from defendants to buy other housing, the requirement imposed by the lower courts that plaintiffs repay these sums before their arguments

could even be heard meant that they were effectively denied any remedy.[1]

Defendants attempt to distinguish *Hogue v. Southern Ry.*, 390 U.S. 516 (1968), on the ground that there this Court stated that "requiring tender back would be 'wholly incongruous with the general policy of the Act' to provide injured employees a right to recover for injuries negligently inflicted by their employer." Def. Opp. 7-8. Here, it is just as incongruous with the remedial purpose of the Fair Housing Act to require repayment and thereby make it almost impossible for plaintiffs to remedy defendants' unconstitutional actions.

This Court's decision in *Oubre* is therefore likely to have a substantial bearing on the present case.

2. Defendants also argue that the decision of the court below "is consistent with the decisions of other courts of appeals holding that the equitable remedy of rescission cannot be afforded to parties who are unable or unwilling to surrender the benefits of the challenged contract and restore the status quo ante." Def. Opp. 8. However, none of the holdings in these cases involved the Fair Housing Act or turned on constitutional issues at all.

Moreover, the federal courts are split on whether rescission demands the return of the property received by the plaintiffs. In cases not cited by defendants, the courts have held that repayment is not required. "Where rescission occurs, restitution is *usually* the next step" (emphasis added). 1 Dobbs, *Law of Remedies*, § 4.3(6), p. 615. Thus, the courts have stated that the rule as to restitution is "to be applied in accordance

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[1] The only alternative would have been to try the issue as to only one plaintiff at a time and to have plaintiffs' counsel loan that plaintiff the money to make repayment to defendants.

with equitable principles." *Delta Investing Corp. v. Moore*, 366 F.2d 516, 520-521 (6th Cir. 1966). Accord, *Dermott Land and Lumber Co. v. Walter A. Zelnicker Supply Co.*, 272 F. 918, 920-921 (8th Cir. 1921) ("The rule that the party who seeks to rescind a contract shall return whatever he has received thereunder, like other rules of justice, must be applied in the practical administration of justice as shall best subserve in each particular case the undoing of wrong and the vindication of right."); *First National Bank & Trust Co. v. American Security and Trust Co.*, 437 F. Supp. 771, 774 (D.D.C. 1977).

Therefore, there is a conflict of circuits on this issue, and the writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons and those set forth in petition for a writ of certiorari, the petition for a writ of certiorari should be granted or this Court should delay ruling on the petition until the *Oubre* case is decided.

Respectfully submitted,

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October 6, 1997